Qwest
1801 California Street, 10th Floor
Denver, Colorado 80202
Phone 303-383-6653
Facsimile 303-896-1107

Daphne E. Butler
Senior Attorney

VIA ECFS

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EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172*

Qwest files this *ex parte* to address arguments that the *Omaha Forbearance Order* requires a market share test in addition to a coverage threshold test in determining where forbearance from unbundling is appropriate. As Verizon argued in its *ex parte* dated November 30, 2007,[1] in the *Omaha Forbearance Order* the Federal Communications Commission ("Commission") adopted a coverage threshold test which provided relief in every wire center in which cable voice services could be made available to 75 percent of the customer premises in the wire center within a commercially reasonable time. The Commission did not adopt a market share standard in Omaha.

In both *Omaha and Anchorage*, the Commission granted unbundling relief on a wire center basis after examining the availability of cable voice service in the wire center. The Commission adopted a 75 percent coverage threshold test to identify wire centers with sufficiently extensive facilities-based competition to justify unbundling relief. The Commission found that an intermodal competitor covers "a location where it uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC's local service offerings."[2] The Commission's decision to focus on ability to compete, rather than market share

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[1] Letter from Evan T. Leo, Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, Counsel for Verizon, to Marlene H. Dortch, FCC, dated Nov. 30, 2007.

[2] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19444-45 ¶ 60, n.156 (2005) ("*Omaha Order*" or "*Omaha Forbearance Order*"), *aff'd, Qwest v. FCC*, 482 F.3d 471 (D.C. Cir. 2007). *In the Matter of Petition of ACS of Anchorage,*

is consistent with its prior unbundling decisions. For example, the Commission defined impairment to focus on whether lack of a network element "poses a barrier or barriers to entry, including operation and economic barriers, that are likely to make entry into a market uneconomic."[3] Thus, the Commission's focus is on ability to enter, not on market share achieved upon entry. Similarly, the D.C. Circuit Court of Appeals stated in its *USTA II* decision that the Commission cannot "simply ignore facilities deployment along similar routes when assessing impairment."[4]

Consistent with this precedent, in the *Omaha Forbearance Order*, in addition to examining facilities coverage, the Commission also examined whether Cox was capable of competing in Omaha, noting that Cox's success with mass-market customers proved that Cox was capable of competing successfully using its own network.[5] The Commission did not, however, focus on market share. Thus, while the Commission had residential market share data for Cox in Omaha, it did not even have such data for enterprise customers. Moreover, it surely did not examine market share on a wire center by wire center basis.

The Commission should not now depart from the coverage threshold test. Unbundling can be justified only where it is necessary to facilitate the deployment of competitive facilities. Once such facilities have been deployed, requiring that competitors achieve a certain level of market success would be contrary to the D.C. Circuit's directive that where there is robust competition it is "hard to see any need for the Commission to impose the costs of mandatory unbundling."

Respectfully submitted,

/s/Daphne E. Butler

Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area, 22 FCC Rcd 1958, 1977 ¶ 32 (2007), *appeals dismissed, Covad Communications Group, Inc. v. FCC*, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007) (dismissing appeals for lack of standing).

[3] *See, e.g., In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17035 ¶ 84 (2003), *corrected by Triennial Review Order Errata*, 18 FCC Rcd 19020, 19022 ¶ 26 (2003) (subsequent history omitted).

[4] *USTA v. FCC*, 359 F.3d 554, 575 (D.C. Cir. 2004).

[5] *Omaha Forbearance Order*, 20 FCC Rcd at 19448 ¶ 66.

cc: (via e-mail)

Dana Schaffer (Dana.schaffer@fcc.gov)
Donald Stockdale (Donald.stockdale@fcc.gov)
Gary Remondino (Gary.remondino@fcc.gov)
Jeremy Miller (Jeremy.miller@fcc.gov)
Tim Stelzig (Tim.stelzig@fcc.gov)
Nicholas Alexander (Nicholas.alexander@fcc.gov)
Marcus Maher (Marcus.maher@fcc.gov)